UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

VERSUS

LATOYA D. BOWERS

CRIMINAL ACTION

NO. 18-110-JWD-EWD

RULING AND ORDER

This matter comes before the Court on the *Motion to Suppress Taped Statements* (Doc. 13) filed by Defendant Latoya D. Bowers ("Defendant"). The Government opposes the motion (Doc. 16), and Defendant has filed a reply (Doc. 17). Following an evidentiary hearing (Doc. 34), post-hearing briefs were submitted (Docs. 37, 40). Further argument is not necessary. The Court has carefully considered the law, the facts in the record, and the arguments and submissions of the parties and is prepared to rule. For the following reasons, Defendant's motion is denied.

I. Factual Background

Defendant is charged in a three-count indictment with delaying or destroying mail in violation of 18 U.S.C. § 1703(a). (Doc. 1.) The Indictment alleges three specific instances of such unlawful conduct allegedly occurring in September and October of 2017. (*Id.*)

At the evidentiary hearing, the Government presented evidence and the testimony of Special Agent Brandon Toullier of the United States Postal Service, Office of Inspector General. (Tr. 3, Doc. 38.) Toullier testified that workers had been cleaning a canal with bulldozers and found "a whole bunch of U.S. Mail that was scattered on the banks and in the water of the canal." (Tr. 4, Doc. 38.) Two mail trays were also discovered, and Toullier was able to use identifying tags on them and a database to determine that Defendant was the mail carrier who was supposed to deliver the discarded mail. (Tr. 5–7, Doc. 38.)

Toullier then set up a "live test" with a letter and package and surveilled the Defendant. (Tr. 8–9, Doc. 37.) During this time, Toullier allegedly discovered that Defendant did not deliver the test mail and skipped some of her route, including the end. (Tr. 8–9, Doc. 38.) Toullier and his partner Kathaleen Alwell also observed Defendant carrying a "U.S. Mail satchel that was real heavy and appeared to be full of mail and she brought it to her personal vehicle and placed it" there, which was improper for a number of reasons. (Tr. 10–11, Doc. 38.) Next, using the tracking devices on the test mail, the agents followed the Defendant along I-110 to Scenic Highway, activated their lights and sirens, and pulled Defendant over. (Tr. 12, Doc. 38.)

After *Mirandizing* her, Toullier and Alwell talked to her for "a couple of minutes and then [Alwell] retrieved her video camera because [they] knew [they] were going to be searching her car and it was so dark and on the side of the street it was impossible to take notes, so it was better to just record the entire interview." (Tr. 13, Doc. 38.) The video camera was on Alwell's person. (*See* Video of Interview, Def. Ex. 1.) While Toullier was interviewing the Defendant, Alwell went to search the vehicle (with Defendant's consent) to see if there was other mail there. (Tr. 15, Doc. 38; Def. Ex. 1.) When Alwell returned (with the camera), Defendant denied putting mail into the canal, but she admitted that she failed to deliver the mail, that she had someone meet her on the route, and that she gave the mail to that person. (Tr. 15–16, Doc. 38; Def. Ex. 1.)

That video is the subject of this motion. As Defense counsel explained at the hearing:

> It's 13 minutes and 24 seconds long. The first approximately six minutes of it are just normal kind of an encounter with the officers. They're talking back and forth. There is about, oh three minutes or so of, I want to say, that it's – you can't hear very much. You can hear bits and pieces, but it's basically just some silence. And so after you get past those three minutes there's another couple of minutes of where you can hear everything.

(Tr. 24, Doc. 38.) In short, and as explained in greater detail below, Defendant seeks to exclude the entire video because three of the roughly thirteen and a half minutes are inaudible.

II. Procedural Background

Defendant filed her motion on October 3, 2018. (Doc. 13.) Amidst Defendant's other arguments (discussed below), Defendant stated: "Since Defendant has not yet been provided requested discovery, Defendant reserves the right to supplement or amend this motion . . . based on that discovery." (Doc. 13 ¶ 4.). The evidentiary hearing was originally for December 6, 2018. (Doc. 14.)

The Government filed its opposition on October 24, 2019. (Doc. 16.) The Government acknowledged its failure to provide discovery and stated that it produced the items simultaneously with its filing of its brief. (Doc. 16 at 2.) The Government went on to argue points largely not raised by Defendant.

Defendant replied on November 7, 2019. (Doc. 17.) There, she tweaked her prior argument in light of the discovery produced and clarified her argument, as recited *infra*. (*Id.*)

The Court reset the hearing for December 4, 2018 (Doc. 19), and the Government moved for a continuance because the "partiers [were] . . . engaged in plea negotiations in an effort to determine whether a pre-trial resolution of this matter can be reached." (Doc. 20 ¶ 5.) Defendant did not oppose the continuance and joined in the motion. (Doc. 20 ¶ 6.) The Court continued the matter to January 8, 2019. (Doc. 21.)

On January 4, 2019, the Government filed another joint motion to continue, for the same reasons. (Doc. 22 ¶ 5.) Again, the Defendant joined in the motion. (Doc. 22 ¶ 6.) The Court granted the continuance and reset the hearing for February 6, 2019. (Doc. 23.)

On February 4, 2019, the Government moved for a four-week continuance of the hearing in order to produce certain discovery. (Doc. 24-1) Defendant did not oppose the motion and joined

in it. (Doc. 24-1.) The evidentiary hearing was reset for March 14, 2019, but the Court later reset it for March 11, 2019. (Doc. 32.)

On March 11, 2019, an evidentiary hearing was held, and the Court ordered post-hearing briefing due simultaneously thirty days after the transcript was filed into the record, with replies due seven days thereafter. (Doc. 34.) Before the transcript was filed, Defendant submitted her post-hearing brief. (Doc. 37.) On May 13, 2019, the transcript was filed into the record. (Doc. 38). The Government failed to timely submit any post-hearing brief. On June 21, 2019, the Government filed a motion to submit a brief out-of-time (Doc. 40), which the Court granted (Doc. 41). The Court also gave the parties seven additional days to file reply briefs (Doc. 41), but no further briefs were filed.

III. Parties' Arguments

Defendant initially argues: "Upon information and belief, the tape did not record her entire statement, but only statements restating the officer's inculpatory statements or questions to her. Consequently, the tape omits portions of her statements, which were [exculpatory] in nature." (Doc. 13 at 1.) Defendant claims that the tape does not include "her entire statement, which placed into context the statements [heard], which could be misunderstood, if only the taped statements were played." (Doc. 13-1 at 1.) Defendant urges that the entire tape be suppressed as being fundamentally unfair. Defendant cites to no case law to support her position.

In its opposition, the Government does not respond to the substance of Defendant's argument. Instead, it discusses other issues not raised by the Defendant, such as consent to search and the automobile exception.

In her reply, Defendant clarifies, with the help of the previously unproduced discovery, that the issue is not that the tape failed to record the entire statement but that the part of the video

was unintelligible. Defendant further states:

> To clarify the point Defendant is raising, she is not raising the voluntariness of the tape[d] statement, or other traditional grounds for motions to suppress. She is simply saying that it is patently unfair for the jury to hear a portion of the interview, while the other portion is left to the individual participants' interpretation of what was said in the interview. Rather, if it cannot be heard in its entirety, it should not be played. Instead, the whole interview should be left to the participants individual interpretation of what was said or not. The risk is that the jury will put too much weight on what was heard on the tape, as opposed to what was said off tape.

(Doc. 17 at 2.)

In her post-hearing brief, Defendant frames the question: "[I]f the taped statement does not include her entire statement, and if the entire statement is necessary to convey an actual depiction of the events at issue, should the taped statement be suppressed?" (Doc. 37 at 1.) Defendant cites a Louisiana statute, La. Rev. Stat. Ann. § 15:450 as persuasive authority. Further, according to Defendant, the rule in the Fifth Circuit is that a tape recording which is partially unintelligible is admissible "unless those portions are so substantial as to render the recording as a whole untrustworthy." (Doc. 37 at 2.) Defendant urges that, because this is a recorded statement of an accused in a custodial interrogation, the omitted portions are extremely important. Defendant states that the Government has the burden and that her motion should be granted.

In its post-hearing brief, the Government again urges that its search of the vehicle and obtaining of statements was constitutional. According to the Government, Defendant has failed to identify "what among the alleged unrecorded statements supports her defense to the charges in the Indictment." (Doc. 40-1 at 2.) Further, the Government notes that the video was made after a lengthy investigation of the Defendant which already produced considerable evidence against her. The Government again closes with a discussion about the automobile exception and probable cause.

IV. Discussion

A. Applicable Law

"The fact that certain portions of the tape are inaudible does not render the entire tape inadmissible." *United States v. Gordon*, 688 F.2d 42, 44 (8th Cir. 1982) (finding no abuse of discretion in admitting tapes where defendant objected to, among other things, the "overall poor quality of the tapes" and that "some tapes were filtered"). "Tape recordings which are only partially unintelligible are admissible unless those portions are so substantial as to render the recording as a whole untrustworthy." *United States v. Llinas*, 603 F.2d 506, 508 (5th Cir. 1979) (citing *United States v. Wilson*, 578 F.2d 67, 69 (5th Cir. 1978)); *see also United States v. Stone*, 960 F.2d 426, 436 (5th Cir. 1992) ("this Court has consistently held that poor quality and partial unintelligibility do not render tapes inadmissible unless the unintelligible portions are so substantial as to render the recording as a whole untrustworthy. . ." (numerous citations omitted)); *United States v. West*, 948 F.2d 1042, 1044 (6th Cir. 1991) (same) (citing *United States v. Robinson*, 763 F.2d 778, 781 (6th Cir. 1985) ("*Robinson II* ")).

"The determination as to the trustworthiness of a tape recording is left to the sound discretion of the trial judge." *Llinas*, 603 F.2d at 508 (citing *United States v. Avila*, 443 F.2d 792, 795 (5th Cir. 1971)); *see also Wilson*, 578 F.2d at 69 ("The initial decision whether to admit into evidence a recording containing inaudible or unintelligible portions is committed to the sound discretion of the district court"); *Stone*, 960 F.2d at 436 ("this determination is left to the sound discretion of the trial judge" (numerous citations omitted)); *West*, 948 F.2d at 1044 ("The decision to admit tapes is within the sound discretion of the court." (citing *Robinson II*, 763 F.2d at 781; *United States v. Jones*, 540 F.2d 465, 470 (6th Cir. 1976)); *Gordon*, 688 F.2d at 44 ("The trial

judge has broad discretion to admit tapes" (citing *United States v. Watson*, 594 F.2d 1330, 1335 (10th Cir. 1979); *United States v. Howard*, 504 F.2d 1281, 1287 (8th Cir. 1974)).

The Fifth Circuit has affirmed the admission of partially unintelligible conversations on several occasions. In *Llinas*, the Fifth Circuit found no error in admitting a tape despite "inaudible portions" because (1) "the transcript as a whole clearly reveal[ed] a highly incriminating conversation of a conspiratorial nature"; (2) "[t]he flow of the conversation [was] not difficult to follow"; and (3) "it [was] quite obvious that the conversation [was] substantially intelligible." *Id.*, 603 F.2d at 508–09.

Similarly, in *Wilson*, the Fifth Circuit found no abuse of discretion because "[w]hile some portions of the recording are inaudible and unintelligible, much of it can be heard clearly." *Id.*, 578 F.2d at 69. Further, the Fifth Circuit agreed with the district court that, though "some of the conversation was not intelligible, . . . a sufficient portion was understandable and had enough probative value to warrant its admission." *Id.*

United States v. Stone, 960 F.2d 426 (5th Cir. 1992) is a particularly powerful example. There, the Government sought the introduction of tapes despite the fact that "[a] heavy thunderstorm during [the recording] interfered with the reception, and large portions of the tapes [were] very difficult to understand." *Id.* at 435. Defendant objected that the tapes "were of such poor quality that they would mislead the jury." *Id.* The district court admitted the tapes (as well as a transcript) but provided a curative instruction:

> "Now, this [transcript] is only for your general guidance. You are directed and ordered by this Court to make your own interpretation of what you hear from that tape. This is only what the Government believes [is] on this tape. And if you feel it's unintelligible, then you are to disregard anything that you feel is unintelligible, notwithstanding what the Government has down as to what its position is on that tape.

> "So, in effect, I will let you consider this just as—well, just as a transcript as far as the Government's version is concerned. The defense in no way adopts this version. . . . However, it's my decision to allow you to use it for whatever weight, if any, you desire to give to it. If you feel that tape is unintelligible, then disregard what the Government thinks is on that tape. And if you listen and you hear it differently from what is down here, you ought to consider what you hear as best you can from the tape." . . . "It [the transcript] is not evidence in this case. The tape is the evidence."

Id. at 435. The Fifth Circuit held: "We find no abuse of discretion in the admission of the tapes here, particularly given the precautions taken by the court when they were played." *Id.* at 436 (citation omitted).

B. Analysis

Having carefully considered the law and evidence, the Court will deny Defendant's motion for three reasons. First, this case appears to be in line with the Fifth Circuit authority cited above. As in *Llinas*, the video "as a whole clearly reveal[ed] a highly incriminating conversation." *Id.*, 603 F.2d at 508. Further, as noted at the hearing, only three minutes of the entire thirteen and a half minute encounter are inaudible. Thus, though "some of the conversation was not intelligible, . . . a sufficient portion was understandable and had enough probative value to warrant its admission." *Wilson*, 578 F.2d at 69. That is, this case is like *Llinas*, 603 F.2d at 509 ("it [was] quite obvious that the conversation [was] substantially intelligible") and *Wilson,* 578 F.2d at 69 (in which "much of" the video could be heard) and a far cry from *Stone*, 960 F.2d at 435 (where "heavy thunderstorms" rendered "large portions of the tapes . . . very difficult to understand"). On this ground alone, the motion could be denied.

Second, the Court in its discretion finds another point important in deciding that the video is not "as a whole untrustworthy." Specifically, Toullier said on the video that Alwell searched the vehicle to see if there was other mail there (Def. Ex. 1 at 4:30), and this is consistent with his testimony (Tr. 15, Doc. 38). The Court finds that this is a reasonable and believable explanation

for Alwell leaving with the camera. Phrased another way, there is nothing to indicate from the video or from Toullier's testimony that the agents selectively edited or cut out part of the recording intentionally or in bad faith. This too weighs against Defendant.

And third, as in *Stone*, the Court will mitigate any prejudice to the Defendant with a cautionary instruction. This instruction will emphasize: (1) the jury should "make [its] own interpretation of what [they] hear from [the video]"; (2) that "if [they] feel it's unintelligible, then [they] are to disregard anything [they] feel is unintelligible, notwithstanding" the Government's position; (3) the "defense in no way adopts [the Government's] version" of the video; (4) the jury may use the video "for whatever weight, if any, [it] desire[s] to give to it"; and (5) "[i]f [they] feel that [a portion of the video] is unintelligible, then [they should] disregard what the Government thinks is on that [video.]" *Stone*, 960 F.2d at 435. The Court will also consider proposed instructions submitted by the parties, provided that they are submitted sufficiently in advance of trial.

In sum, the Court has considerable discretion here and finds that the unintelligible portions of the video are not "so substantial as to render the recording as a whole untrustworthy." *Llinas*, 603 F.2d at 508 (citations omitted). Consequently, Defendant's motion is denied.

V. Conclusion

Accordingly,

IT IS ORDERED that the *Motion to Suppress Taped Statements* (Doc. 13) filed by Defendant Latoya D. Bowers is **DENIED.**

Signed in Baton Rouge, Louisiana, on July 29, 2019.

JUDGE JOHN W. deGRAVELLES
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA